

REMARKS

The indication by the Examiner of allowable subject matter in claims 4 and 5 is gratefully acknowledged. The courtesy of the Examiner in listing GB 2,035,035 (Fitzpatrick) on a PTO-892 also is gratefully acknowledged.

In the first Office Action, there was a rejection under 35 USC 112 that “especially of coconut milk” in claims 1 and 2 rendered the claims indefinite. In the previous Amendment, in response to that rejection, “especially of coconut milk” was deleted from claims 1 and 2, and new claims 4 and 5 were presented that depend on claims 1 and 2, respectively, and recited that “the free surface fat is coconut milk powder”. As can be appreciated, for accuracy, the feature of “especially of coconut milk”, when moved from claims 1 and 2 to dependent claims, should have been recited in the dependent claims as “the free surface fat is that of coconut milk powder”. By the present Amendment, claims 4 and 5 have been amended to recite that “the free surface fat is that of coconut milk powder”.

The deletion of “the” before “food stuff” in claims 1 and 2 merely makes the language of the claims more idiomatic.

Reconsideration of the rejection of claims 1 and 2 under 35 USC 103 as being obvious over Fitzpatrick in view of Le Gloahec is respectfully requested. The present invention uses lecithin and alginate dispersed in water or oil and sprayed onto powder (“lecithin and alginate in water or an aqueous liquid are sprayed onto the powder particles” – claims 1 and 2). It creates a layer around the powder where the lecithin is responsible for the instantization of the product, and the alginate performs the function of keeping the lecithin molecules where they are (in the alginate layer). This means that, after some weeks, the lecithin, which usually tends to migrate into the

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particles after a while, will remain on the surface and maintain the good instant behavior of the powder.

In the Response to Arguments, on page 4 of the Office Action, the Examiner states that Le Gloahec teaches using alginate in making instant powders by adding the alginate composition to the milk product and dehydrating said mixture, which becomes an instant powder. However, the applicants point out that such a disclosure does not suggest, in the words of claims 1 and 2, alginate in water or an aqueous liquid being sprayed onto powder particles. Furthermore, the portion of the disclosure of Le Gloahec cited by the Examiner, which relates to providing a compound "that is soluble in water and that is chemically non-reactive with dissolved calcium salts", also does not suggest, in the words of claims 1 and 2, alginate in water or an aqueous liquid being sprayed onto powder particles. The Examiner concludes that the use of alginates to form instant powders was known in the art prior to the present application, but the applicants do not claim "the use of alginates to form instant powders". They claim, among other things, alginate in water or an aqueous liquid being sprayed onto powder particles.

Also in the Response to Arguments, the Examiner states that Le Gloahec's disclosure of adding the alginate compound to "dairy products or the like" and "of any milk product or other product" would not only encompass liquid dairy products, but also dry dairy products, i.e., powdered milk, which would result in the alginate compound being mixed with a dry dairy product, thus disclosing the use of alginate on food powders. However, the applicants point out that, even if Le Gloahec did disclose the use of alginate on food powders, that would not be a disclosure of alginate in water or an aqueous liquid being sprayed onto powder particles. The Examiner states that Le Gloahec shows that alginate is used in a method for producing instant powders, but that is not a

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disclosure of alginate in water or an aqueous liquid being sprayed onto powder particles.

Furthermore, "dairy products or the like" and "of any milk product or other product" is not a disclosure even of, generally, the use of alginate on food powders. The phrases quoted by the Examiner are taken out of context. When Le Gloahec is considered in its entirety, it is clear that it relates to adding alginate to ice cream, chocolate syrup, milk chocolate malted milk and the like (page 1, left column, lines 7-11), but not adding it to powders. All relevant teachings of cited references must be considered in determining what they fairly teach to one having ordinary skill in the art. *In re Mercier*, 185 USPQ 774 (CCPA 1975). The contention that "dairy products or the like" and "of any milk product or other product" is a disclosure of the use of alginate on food powders is speculation that is not supported by the reference. Anticipation cannot be predicated on an ambiguous reference. *In re Turley*, 184 USPQ 355 (CCPA 1962). Furthermore, it cannot be said that "dairy products or the like" and "of any milk product or other product" inherently discloses the use of alginate on food powders. To establish inherency, the extrinsic evidence "must make clear that the missing descriptive matter is necessarily present in the thing described in the reference, and that it would be so recognized by persons of ordinary skill." *Continental Can Co. v. Monsanto Co.*, 948 F.2d 1264, 1268, 20 U.S.P.Q.2D (BNA) 1746, 1749 (Fed. Cir. 1991). "Inherency, however, may not be established by probabilities or possibilities. The mere fact that a certain thing may result from a given set of circumstances is not sufficient." *Id.* at 1269, 20 U.S.P.Q.2D (BNA) at 1749 (quoting *In re Oelrich*, 666 F.2d 578, 581, 212 U.S.P.Q. 323, 326 (C.C.P.A. 1981)).

The Examiner's conclusion in the Response to Arguments, "Therefore, given Le Gloahec's disclosure of the use of alginate on dairy products, it would have been obvious to one of ordinary skill in the art to incorporate Le Gloahec into the instant milk powder of Fitzpatrick to obtain a stable

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product with the desired viscosity”, again seems to ignore the fact that claims 1 and 2 recite “lecithin and alginate in water or in an aqueous liquid are sprayed onto the powder particles” rather than merely reciting the use of alginate on dairy products.

The Examiner also states in the Response to Arguments that, due in part to Le Gloahec's disclosure of alginate improving the smoothness and texture in milk mixes (page 1, col. 2, lines 5-30), one of ordinary skill would have clearly been motivated to apply both lecithin and alginate to milk powders. The lines cited by the Examiner disclose only for ice cream mixes that alginous material is desirable because it improves the smoothness and texture of the ice cream. They do not even disclose that alginous material improves the smoothness and texture of chocolate syrup, milk chocolate, or malted milk, to which Le Gloahec suggests adding alginous material, much less disclose that alginous material improves the smoothness and texture of a powder, to which Le Gloahec does not suggest adding alginous material. Furthermore, it is clear from his specification that Le Gloahec is aware of powders like milk chocolate drink powders and ice cream powders and that he is aware of adding an algin compound to food products, and yet he does not suggest adding an algin compound to powders. Thus, Le Gloahec actually teaches away from adding an algin compound to powders. Accordingly, it would not have been obvious to spray alginate in water or in an aqueous liquid onto powder particles in view of the teaching of Le Gloahec.

Near the end of the Response to Arguments the Examiner states “...given that both the lecithin and alginate are taught to be sprayed onto the powder as an aqueous solution, it would be obvious to one of ordinary skill to apply them both at the same time to alleviate the possibility of the powder becoming saturated with water”. However, the applicants point out that neither reference teaches spraying alginate onto a powder as an aqueous solution.

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The Examiner is also referred to the Remarks of the Amendment dated February 11, 2010, including:

1. the fact that, prior to the present invention, it was believed, as is explained on page 2, first full paragraph of the present application, that the effect of alginates in liquid was to coagulate the liquid and thus to counteract instantization, and that is precisely what the Le Gloahec document appears to describe, including on page 1, column 1, line 51 – column 2, line 7;

2. when the entire disclosure of Le Gloahec is considered, it is clear that Le Gloahec discloses that a product processed according to the method of Le Gloahec can be dehydrated and in this way processed to form a powder, and that dehydration appears to be a step that occurs after alginate is mixed with the liquid dairy product;


3. it is clear that the powder is the final product of Le Gloahec and that no processing of the powder takes place, that it is not inherent that the powder product of Le Gloahec will come into contact with an algin solution, and that, thus, the use of alginates on food powder and in particular for instantization is not disclosed by Le Gloahec.

In view of the foregoing, it is submitted that all of the claims are allowable and that the application is in condition for allowance. An early notice to that effect is respectfully requested.

The Commissioner is hereby authorized to charge any deficiency in fees or to credit any overpayment in fees to Attorney's Deposit Account No. 50-0562.

Respectfully submitted,

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